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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PHILIP MORRIS INCORPORATED
(d/b/a PHILIP MORRIS U.S.A.),

Petitioner,

v.

CABARRUS COUNTY, NORTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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PETITION FOR A WRIT OF CERTIORARI

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103 pp

QUESTION PRESENTED

Whether the use of private "bounty hunters" by a county government to conduct property tax audits under a pure contingent fee arrangement violates the Due Process Clause of the Fourteenth Amendment.

Rule 29.1 Statement

The parent company of petitioner is Philip Morris Companies Inc., a publicly-owned corporation. Petitioner does not have any subsidiaries that are not wholly-owned.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina in this case has been reported at 335 N.C. 227, 436 S.E.2d 828 (1993). The opinion is reproduced in the Appendix at pages 1a-6a. The order of the Supreme Court of North Carolina denying rehearing, 335 N.C. 566 (1994), is reproduced in the Appendix at page 40a. The opinion of the Court of Appeals of North Carolina in this case is reported at 108 N.C. App. 514, 424 S.E.2d 222 (1993). The opinion is re-

produced in the Appendix at pages 7a-15a. The findings of fact and conclusions of law of the North Carolina Property Tax Commission are reproduced in the Appendix at pages 16a-29a. The decision of the Cabarrus County Board of Equalization and Review is reproduced in the Appendix at pages 30a-32a. The notices issued by respondent's Assessor are reproduced in the Appendix at pages 33a-37a.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on December 3, 1993. Petitioner's timely petition for rehearing was denied on January 27, 1994.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the United States Constitution, amend. XIV, sec. 1 provides that: "No State . . . shall deprive any person of life, liberty, or property without due process of law . . . ."

Relevant portions of Sections 105-273(6a) and (6b), 105-283, 105-296(a), (b), (g) and (h), 105-299, 105-312(b), (d) and (g), and 105-322(a) and (g) of the North Carolina General Statutes are set forth in the Appendix at pages 41a-52a. (In the case of minor variations in the wording or placement of certain of the

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[1] Petitioner was advised by the Office of the Clerk of this Court that due to the national day of mourning scheduled for April 27, 1994, petitions otherwise due by that date would be accepted as timely filed on April 28, 1994, under Rule 30.1.

pertinent statutory provisions during the years at issue, only the current provision is included.)

STATEMENT

Petitioner owns a manufacturing plant in Cabarrus County, North Carolina, which began operation in 1983. For each of the years 1983 through 1989, petitioner prepared and filed a North Carolina Business Personal Property Tax Return in accordance with applicable North Carolina statutes governing the imposition of local *ad valorem* property taxes. During each of the years in question, petitioner was the largest taxpayer in Cabarrus County.

A. The Audit

Pursuant to North Carolina General Statutes, N.C. Gen. Stat. § 105-299, respondent Cabarrus County hired Tax Management Associates, Inc. ("TMA") in 1988 to assist the County Assessor. TMA is a private corporation. Its work for respondent was to include the conduct of personal property tax audits that could result in a "discovery" with respect to a particular taxpayer's property. Under North Carolina law, to "discover" property includes determining whether certain property has not been listed (*i.e.*, reported on a taxpayer's tax return) and whether there has been a substantial undervaluation of property that has been listed. N.C. Gen. Stat. § 105-273(6b).

Under the express terms of the contract between TMA and respondent, TMA was to receive as its fee for services rendered "35% of taxes discovered including penalty." (App. 54a.) Of this amount, TMA was to be paid 25% after respondent's Assessor issued a notice of discovery to the taxpayer, 25% after

the taxpayer's local appeal right was exhausted, and 50% upon the earlier of actual payment by the taxpayer or the last day the taxpayer could pay the amount due without interest. *Id.* While the North Carolina General Statutes authorize the employment of private auditing firms to assist the Assessor, they are silent regarding the use of such contingent fee arrangements. *See* N.C. Gen. Stat. § 105-299.

Respondent's contract with TMA provided that TMA would audit "a reasonable sample" of the county's business personal property taxpayers. (App. 53a.) In fact, both petitioner and Cannon Mills, Inc., the two largest taxpayers in the county, were selected for audit as part of the "random selection process."[2] The North Carolina Property Tax Commission found as a fact that "[t]he discovery by the County conducted against the Taxpayer [petitioner here] was a direct result of the County's entry into the agreement with TMA." (App. 24a.)

TMA performed its discovery work by reviewing petitioner's accounting books and records and, *inter alia*, adding particular items of expense, overhead and "capitalized interest"[3] to the cost figures for petitioner's property as shown for accounting purposes. Certain adjustments were then made to reflect the age of the property. TMA did not visit petitioner's

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[2] Transcript of Proceedings Before Property Tax Commission, May 21, 1991, p. 82.

[3] "Capitalized interest" included by TMA was not interest on money borrowed to purchase personal property, but "imputed interest" reflected on petitioner's books under applicable accounting standards.

factory or undertake (or cause to be undertaken) an appraisal of any of petitioner's property.[4]

On December 20, 1989, based on TMA's audit of petitioner's books, the Assessor issued a notice of proposed discovery to petitioner for the years 1983 through 1989 in the amount of $1,325,000,000. (App. 36a-37a.) On February 2, 1990, TMA issued a report recommending that the notice of proposed discovery be revised to assert an understatement for the years 1984 through 1989 only, in the aggregate amount of $975,821,507. (App. 64a.) After receiving several communications from petitioner, the Assessor and TMA held various formal and informal meetings with petitioner's representatives. The Assessor issued his Final Decision on May 8, 1990, in which the understatements of personal property for the years 1984 through 1989 were claimed to aggregate $923,339,510. (App. 34a.)

B. Proceedings Below

On May 17, 1990, petitioner timely filed a formal request for review of the Assessor's Final Decision with the Cabarrus County Board of Equalization and Review (the "Board"). Petitioner's principal objections were that, contrary to North Carolina law, (1) TMA used book figures rather than appraised values in making its determinations,[5] (2) TMA improperly included "capitalized interest" in property values, and (3) TMA "double-counted" as personal property a substantial amount of building and equipment assets that had been taxed as real property. (App. 66a-71a.)

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[4] Application for Hearing Before Property Tax Commission, Jan. 2, 1991, Statement attached to par. 3 at p. 6.

[5] *See* N.C. Gen. Stat. § 105-283.

Following a hearing, the Board issued its decision on November 7, 1990. The Board, *inter alia,* upheld the Assessor's Final Decision to the extent of $548,499,052 in alleged personal property understatements for the years 1984 through 1989, and imposed a ten percent across-the-board penalty for late filing with respect to those understatements. (App. 30a-32a.)[6] Petitioner's liability as a result of the Board's decision was $3,608,723 in taxes and penalties, plus accrued interest. (App. 32a.)

Petitioner appealed to the North Carolina Property Tax Commission. In a Motion to Declare Discovery Null and Void, petitioner asserted, *inter alia,* that TMA's audit and the accompanying discovery violated the public policy of North Carolina and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[7] On May 24, 1991, the Property Tax Commission held that the discovery violated the State's public policy. (App. 26a.) (The Commission has no jurisdiction to decide constitutional issues. (App. 25a.))

Respondent appealed to the Court of Appeals of North Carolina. Petitioner cross-appealed in order to ensure that its constitutional issues were preserved. (Pl. Appt. Br. at 9.) In the Court of Appeals, petitioner again argued, *inter alia,* that the discovery violated both the State's public policy and the Due Process Clause of the Fourteenth Amendment. (Pl.

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[6] Approximately two-thirds of the Board's $375 million reduction was attributable to the elimination of "capitalized interest" from the calculations.

[7] Petitioner's Motion to Declare Discovery Null and Void and Motion for an Expedited Decision at 2.

Appt. Br. at 11, 19.) The Court of Appeals disagreed with petitioner's claim that its constitutional rights had been violated, but affirmed the Property Tax Commission on public policy grounds. (App. 14a-15a.) The Court of Appeals addressed the constitutional issues as follows:

> Philip Morris' cross-appeal argues that the contract and resulting discovery are also violative of its due process and equal protection rights under both the federal and state constitutions. *We do not agree.* Upon our review of the entire record and the appellant and appellee briefs of both parties, *we conclude that the matters raised and adjudicated in the Commission's Final Decision are not issues of constitutional concern,* but are simply issues dealing with the appraisal, listing, or assessment of property. As such, they were properly before the Property Tax Commission, and it is not necessary for us to review the constitutional questions Philip Morris raises in its cross-appeal.

(App. 14a-15a.) (Emphasis added.)

The North Carolina Supreme Court reversed the decision of the Court of Appeals on December 3, 1993, rejecting petitioner's public policy and Fourteenth Amendment arguments.[8] The Supreme Court dealt with petitioner's constitutional arguments as follows:

> The general rule . . . is that *absent "constitutional restraint,* questions as to public pol-

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[8] Petitioner raised its Fourteenth Amendment arguments in its brief filed with the Supreme Court of North Carolina, portions of which appear in the Appendix at pages 72a-74a.

> icy are for legislative determination." [citations omitted] Therefore, we must consider whether the legislature has determined the public policy with regard to the issue before us.

(App. 4a.) (Emphasis added.)

The Supreme Court devoted the remainder of its opinion to its rejection of petitioner's public policy argument. It therefore necessarily determined that there was no "constitutional restraint" affecting its conclusion that because the legislature did not specifically prohibit the use of contingent fee arrangements with outside auditing firms, it apparently authorized such arrangements. The case was remanded to the Court of Appeals for further proceedings. (App. 6a.)

On December 15, 1993, petitioner filed a Motion to Alter, Amend or Modify Opinion with the Supreme Court, urging that court to hear petitioner's constitutional claims or, in the alternative, to direct the Court of Appeals to hear its claims. Respondent opposed the Motion on the ground that both courts had already passed on petitioner's constitutional claims. The Supreme Court denied the Motion on December 22, 1993. Petitioner then filed a similar motion with the Court of Appeals, which was denied on January 7, 1994. Petitioner next filed a timely Motion for Rehearing with the Supreme Court, which was denied on January 27, 1994.

REASONS FOR GRANTING THE WRIT

The instant case presents a fundamental question of first impression arising under the Due Process

Clause of the Fourteenth Amendment—whether a private firm employed to assist a county tax assessor can have so meaningful a financial interest in the results of its activity as to offend constitutional notions of basic fairness with respect to the tax assessment process.

Respondent Cabarrus County follows a practice not previously considered by this Court—the use of so-called "bounty hunters"[9] (or "tax ferrets," as they have sometimes been described[10]) that are paid on a contingency basis to conduct property tax audits in assistance of the County Assessor. The practice exists in one form or another in several other counties in North Carolina, and in Kansas, Wyoming and Connecticut (and perhaps other states) as well.[11] The Supreme Court of Georgia recently declared the practice illegal as a matter of that state's public policy.

> The power to tax rests exclusively with the government. . . . In the exercise of that power, the government by necessity acts through its agents. However, this necessity does not require nor authorize the creation of a contractual relationship by which the agent contingently shares in a percentage of

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[9] *Union Pac. Resources Co.* v. *State*, 839 P.2d 356, 377 (Wyo. 1992). *See also General Motors Corp.* v. *State Tax Comm'n*, 200 Mich. App. 117, 121, 504 N.W.2d 10, 12 (1993), *appeal dismissed*, 509 N.W.2d 157 (Mich. 1993).

[10] *E.g.*, *State ex rel. Eubanks* v. *Board of Comm'rs*, 150 Kan. 143, 91 P.2d 2, 4 (1939); *but see Dillon Stores* v. *Lovelady*, 253 Kan. 274, 855 P.2d 487, 491 (1993).

[11] *See Dillon Stores*, *supra*; *Union Pac. Resources*, *supra*; *General Elec. Co.* v. *City of Bridgeport*, No. CV93 30 45 71 S. (Conn. Super. Ct. Dec. 16, 1993).

> the tax collected, and we hold that such an agreement offends public policy. The people's entitlement to fair and impartial tax assessments lies at the heart of our system, and, indeed, was a basic principle upon which this country was founded. Fairness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends.

Sears, Roebuck & Co. v. *Parsons*, 260 Ga. 825, 401 S.E.2d 4, 5 (1991).[12]

The court below declined to follow Georgia's lead. Instead, it upheld the use by respondent of private auditing firms that are paid entirely on a contingent fee basis. Following the decision below, petitioner has no recourse but to ask this Court to strike down this egregious and offensive practice.

I. THIS COURT'S PRIOR DUE PROCESS DECISIONS

This Court's prior decisions in the Due Process area would appear to leave little doubt that the use of contingent fee "bounty hunters" to conduct tax audits violates the Fourteenth Amendment.

On several occasions, this Court has considered the question whether the financial interest of a state official acting in an adjudicatory capacity creates a bias factor so strong that it results in a violation of the complaining party's Due Process rights. In *Tumey* v. *Ohio*, 273 U.S. 510 (1927), the fountainhead case in

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[12] In addition, at least two states have prohibited the practice. *See* Utah Code Ann. § 59-2-703(2)(c) (1994); Colo. Rev. Stat. § 39-10-107(1) (1993).

this area, this Court unanimously concluded that a Due Process violation resulted under a set of Ohio statutes authorizing the mayor of a village to impose fines for liquor law infringements, where the fines collected were used in part as a salary supplement to reimburse the mayor for costs incurred in conducting the trials.

This Court extended the *Tumey* doctrine in *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972). There, a mayor was authorized to impose fines for traffic violations, with the money so collected being used to provide funds for village operations. The mayor's responsibility for maintaining village finances provided a sufficient stake in the outcome of the proceedings to taint the process. The fact that the mayor did not personally benefit from the fines collected was not sufficient to distinguish *Ward* from *Tumey*. The further fact that the convicted party had the opportunity for a trial *de novo* in the county court also was not considered sufficient to cure the constitutional defect. Rather, the failure to afford the defendant a "neutral and detached" judge at the first stage of adjudication was considered a fatal flaw in the statutory scheme. 409 U.S. at 62.[13]

In *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980), this Court drew a distinction between the "adjudicatory" functions that were performed in *Tumey* and *Ward*, and the "prosecutorial" function there before it. *Jerrico* involved a regional administrator responsible for enforcing the federal child labor laws. Because the administrator's role was more akin to that

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[13] *See also Connally* v. *Georgia*, 429 U.S. 245 (1977); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973).

of zealous prosecutor than dispassionate adjudicator, this Court held that there was a greater burden placed on the complaining party to show that the possibility of bias had so infected the process as to result in a Due Process violation.

This Court concluded in *Jerrico* that the factors that might have biased the administrator's enforcement activities (the penalties collected were to flow back to the enforcement agency, which had authority to allocate them among the various regional offices) were "too remote" to give rise to a Due Process violation. 446 U.S. at 251. In so holding, this Court expressly left open the question of what degree of personal or financial interest might taint a prosecutor's role:

> A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions. * * *
>
> In this case, we need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function,[12] for here the influence alleged to impose bias is exceptionally remote. No governmental official stands to profit economically from vigorous enforcement of the child labor provisions of the Act.
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> * * *

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[12] In particular, we need not say whether different considerations might be held to apply

> if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealousness in the enforcement process.

446 U.S. at 249-50. (Footnote in original.)

* * *

The instant case presents the financial interest question in a context that is part *Tumey/Ward*, part *Jerrico*, and part one step removed from both lines of cases. The unusual combination exists because of uncertainty regarding the nature of the tax assessor's function.

Respondent's Assessor is charged with enforcing the State property tax laws applicable in Cabarrus County. The Board of County Commissioners is authorized by statute to employ private firms "to assist" the Assessor in carrying out his duties. N.C. Gen. Stat. § 105-299. That was done in the instant case because the County had no auditors of its own. (Appt.'s New Br. at 21.)

The Assessor is responsible for reviewing property listings to determine whether additional property should be listed and whether listed property should be revalued. After providing a notice of "discovery" to a taxpayer, the Assessor may hold meetings with the taxpayer before issuing his "final decision." N.C. Gen. Stat. § 105-312(d). He also has subpoena powers to permit the gathering of additional evidence. N.C. Gen. Stat. § 105-296(g).

Here, a proposed notice of discovery was issued on December 20, 1989, in the amount of $1,325,000,000. After receiving several communications from petitioner and a report from TMA recommending a

discovery of over $975 million, the Assessor and TMA held a series of meetings with petitioner's representatives. The Assessor then issued his Final Decision on May 8, 1990, asserting the discovery of over $923 million in understated personal property.

This Court has taken seemingly conflicting positions on the nature of the tax assessor's role. One hundred years ago, this Court observed that an official charged with determining the proper value of property for purposes of *ad valorem* taxation performed a judicial function. In *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701 (1884), Justice Field declared:

> But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. *The officers in estimating the value act judicially*; and in most of the states provision is made for correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. . . .*

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* That the duties of assessors in estimating the value of property for purposes of general taxation are judicial, see *Barhyte* v. *Shepherd*, 35 N.Y. 238, 250; *Hassan* v. *Rochester*, 67 *id.* 528, 536; *Stuart* v. *Palmer*, 74 *id.* 183; *Williams* v. *Weaver*, 75 *id.* 30, 33; Cooley, Law of Taxation, 266; Burroughs, Law of Taxation, sec. 102; *Jordan* v. *Hyatt*, 3 Barb.

> 275, 283; *Ireland* v. *Rochester*, 51 *id.* 416, 430, 431; *The State* v. *Jersey City*, 24 N.J. Law (4 Zabr.), 662, 666; *The State* v. *Morristown*, 34 N.J. Law (5 Vroom), *id.* 445; *Griffin* v. *Mixon*, 38 Miss. 424, 437, 438.

111 U.S. at 710. (Emphasis added; footnote in original.)

Yet, in *Arkansas Corporation Commission* v. *Thompson*, 313 U.S. 132 (1941), this Court through Justice Black suggested a contrary view: "[A]d valorem taxes depend upon a determination of value. The governmental function of fixing the value for tax purposes has rarely, if ever, been a judicial function." 313 U.S. at 142-43.

Resolution of this apparently conflicting view of the role of the property tax assessor is a critical threshold question presented by the instant case. To the extent the Assessor has acted in a judicial or quasi-judicial capacity in issuing his discovery, the *Tumey/Ward* line of cases has direct application. If any portion of the taxes collected as a result of the audit were paid directly to the Assessor (or to his Office, as distinguished from the County generally), a Due Process violation would surely be deemed to have occurred under *Tumey* and/or *Ward*. Can the result possibly be different merely because such a payment was instead to be made to a private firm that assisted the Assessor in making the discovery?

If the Assessor's role is viewed more as that of prosecutor, however, *Marshall* v. *Jerrico* becomes directly relevant. Paying the Assessor (as "prosecutor") a contingent fee based on his determination of tax liability would actually present a situation going far

beyond what was involved in *Jerrico*, or even in *Concrete Pipe & Products, Inc.* v. *Construction Laborers Pension Trust*, ___ U.S. ___ , 113 S. Ct. 2264 (1993), the only case thus far to have addressed the question left open in *Jerrico*. (In *Concrete Pipe*, the fiduciary obligation of the trustees of a multi-employer pension fund suggested the possibility of bias in their determination of the amount of a withdrawing employer's liability to the fund.)

Again, there surely could be no meaningful difference between a contingent fee paid directly to the Assessor acting as a "prosecutor" and a contingent fee paid to his assistant who conducted the tax audit on which the Assessor relied to make his determination of liability. A Due Process violation would necessarily exist in both circumstances or in neither. Consequently, if the Assessor is seen as more of a prosecutor than a judge, the instant case finally presents for resolution the precise issue expressly left open in *Jerrico* but not fully explored in *Concrete Pipe*.

Here, the Assessor had no auditors on his staff. He relied entirely on TMA for assistance. TMA was to be paid solely and exclusively on a contingent fee basis. It is hard to imagine a situation where the "assistant prosecutor" responsible for the case would have a greater stake in the outcome of the proceedings.[14]

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[14] If, at the conclusion of its audit work, TMA had "discovered" that no understatements had occurred, it would have been paid nothing for its efforts under the terms of its contract. TMA had to find understatements in order to be compensated for its services. Moreover, the greater the additional tax liability it

II. THE REVIEW PROCEDURE DOES NOT CURE THE DUE PROCESS VIOLATION

If the Assessor is acting in a judicial or quasi-judicial capacity in the instant case, the bias resulting from TMA's contingent fee contract has thoroughly infected the process under *Tumey* and/or *Ward*. The nature of the review procedure under North Carolina law is therefore immaterial. Even a true *de novo* review at the next stage of the proceedings could not remove the taint in such circumstances. *Ward*; *Jerrico*, 446 U.S. at 247 n.9.

If the Assessor is acting as a prosecutor, the analysis is somewhat different. The question left open in *Jerrico*—how much of a financial interest on the part of the prosecutor will cause a Due Process violation—must contemplate the possibility that if the prosecutor's interest is sufficiently strong, no type of review could cure the defect. Petitioner believes that is in fact the situation here. But if the bias engendered by the contingent fee arrangement is not considered sufficient to give rise to a "*per se*" Due Process violation, then under *Jerrico* and *Concrete Pipe* it becomes necessary to determine whether the suspect influences can be cleansed at the first stage of review.

Under North Carolina law, tax assessments are clearly not reviewed *de novo* at the first stage of the proceedings. Such assessments are presumed to be correct, and are overturned only if the taxpayer can show that (i) the method used to determine them was either "illegal" or "arbitrary," and (ii) the method

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could propose, the greater its compensation was likely to be, because there was no ceiling on the amount it could earn under the contract.

produced "substantial" misvaluations.[15] It is clear, therefore, that the review process cannot play a cleansing role here.

The restricted nature of the review accorded the "prosecutor's" determination by the County Board of Equalization and Review preserves the bias in that determination generated by the contingent fee contract. Even assuming it could be shown that the assessment method used was arbitrary or illegal, any resulting changes in valuation that are not "substantial" cannot be overturned.

The instant case thus falls on the far side of the line established in *Concrete Pipe*. There, a distinction was drawn between first stage adjudications involving a "preponderance of the evidence" standard of proof and adjudications involving standards such as "clearly erroneous" and "unreasonable." 113 S. Ct. at 2279. This Court noted that the latter terms describe a standard of review that implies a degree of deference to be given to factual determinations. *Id.* This Court pointed out that if either of the latter two standards were to be employed in the hearing on review in *Concrete Pipe*, "there would be a substantial question of procedural fairness under the Due Process Clause." *Id.* at 2281.

Here, the standard of review requires at a minimum that any misvaluations be shown to be "substantial." As a result, "insubstantial" revaluations on an item-by-item basis have the potential for producing a significant tax assessment that could be immune from adjustment on review. The Board could be asked to

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[15] *See, e.g., Appeal of Amp Incorporated*, 287 N.C. 547, 562-63; 215 S.E.2d 752, 761-62 (1975) and cases there cited.

review a discovery that could well be excessive in the aggregate and that, at the same time, would carry with it a presumption of correctness that could not be rebutted. That is not the type of review that can cleanse bias in the original determinations.[16]

Moreover, given the nature of the arrangement between respondent and TMA, it is clear that the review process before the Board could not be totally unbiased in any event. Under the contract as drafted, TMA earned its fee when the notice of discovery was issued. That would appear to place the Board under considerable pressure to preserve at least 35 percent of the proposed assessment under all circumstances, in order to ensure that enough tax would be collected from petitioner at least to have sufficient funds to pay TMA.[17] In reality, petitioner had no meaningful opportunity for full and proper relief after a fair and impartial hearing such as this Court found existed in *Jerrico*.

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[16] That petitioner failed to reduce the discovery below $548 million strongly indicates that the review process was not the type of *de novo* review contemplated by *Jerrico* and *Concrete Pipe*. *See* note 6, *supra*.

[17] Petitioner understands that there is presently pending in the North Carolina courts a lawsuit between TMA and respondent regarding the proper interpretation of the contract. (*Tax Management Associates, Inc.* v. *Cabarrus County*, Superior Court of Cabarrus County, No. 93-CvS-847.) However, that lawsuit, which seeks $1,270,500 in fees from the County, was not commenced until May 7, 1993, well after the Board's review process had been completed in the instant case.

III. STATES NEED TO BE INFORMED AS TO THE CONSTITUTIONALITY OF THE "BOUNTY HUNTER" PRACTICE

Resolution of the issue here presented is necessary at this time because of the extensive litigation developing in the state courts. Within the last three years, the "bounty hunter" practice has been challenged in the Supreme Courts of five states and the lower courts of another.[18] In Georgia, the practice was struck down as violative of that state's public policy.[19] In the other five states the practice was upheld, although in one state no contingent fee was involved.[20]

Given the increasing attention that is being devoted to these arrangements, the decision below, if left unreviewed, could cause other states to begin utilizing contingent fee "bounty hunters" without a clear indication as to the constitutionality of the practice. A definitive resolution of the Due Process question is therefore essential at this time if, as petitioner believes, this Court's prior decisions in this area strongly suggest that the practice is constitutionally impermissible.

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[18] Georgia, Wyoming, Michigan, Kansas and North Carolina, as well as Connecticut.

[19] *Sears Roebuck & Co.* v. *Parsons*, *supra*.

[20] *General Motors Corp.* v. *State Tax Comm'n*, *supra* (Michigan—no contingent fee); *Union Pac. Resources Co.* v. *State*, *supra* (Wyoming); *Dillon Stores* v. *Lovelady*, *supra* (Kansas); the decision below (North Carolina); and *General Elec.*, *supra* (Connecticut).

IV. PETITIONER WILL HAVE NO FURTHER OPPORTUNITY FOR A HEARING ON ITS DUE PROCESS CLAIM

Review of the decision below by this Court effectively constitutes petitioner's final opportunity to obtain a hearing on its constitutional claims. Petitioner has continually urged its constitutional arguments, beginning with its first appearance before the Property Tax Commission in May 1991. Both the Court of Appeals and the Supreme Court of North Carolina rejected the arguments in their respective opinions. When the case was remanded for further proceedings, petitioner moved both lower courts to have its constitutional arguments addressed. Respondent then pointed out that petitioner's arguments had already been rejected, explicitly by the Court of Appeals and implicitly by the Supreme Court. (Cabarrus Cty. Response in Opp., N.C. Sup. Ct., Dec. 20, 1993, at 2-3; Cabarrus Cty. Response in Opp., N.C. Ct. App., Dec. 30, 1993, at 5-7.) Petitioner's motions were denied. (App. 38a-39a.) It is clear that only computational issues remain to be decided below. There is absolutely no prospect that petitioner's constitutional claims will be reconsidered by the lower courts.

The instant case thus falls squarely within the broad scope of the "final judgment" rule summarized in *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469 (1975). Both the majority and the dissent in *Cox* agreed that a case in the posture of the instant case is fully ripe for review by this Court. *See* 420 U.S. at 480, and at 506 (Rehnquist, J., dissenting) (recognizing finality "where the federal question decided by the highest court of the State is bound to survive and be presented for decision here regardless of the outcome of future state-court proceedings").

* * *

The payment of unlimited contingent fees to those hired to conduct tax audits as part of the tax assessment process clearly offends basic notions of fundamental fairness under the Due Process Clause. Whether this Court chooses to invoke the *Tumey* rule or resolve the question left open in *Jerrico*, it should now decide whether North Carolina and those other States that rely on contingent fee contracts with outside auditors in administering their tax laws are violating the Due Process Clause.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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